IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STEPHEN B. HARDEN, JR.,	)	
	)	
Plaintiff,	)	C.A. No. 05C-03-030 MJB
v.	)	
	)	
CARAVEL ACADEMY, INC.,	)	
	)	
Defendant/	)	
Third-Party Plaintiff	)	
v.	)	
	)	
ROGER RICHARDSON, MICHAEL AUGUST, GRAND SLAM DIAMONDS n/k/a PIKE CREEK DIAMONDS, and NATIONAL AMATEUR BASEBALL FEDERATION	)	
	)	
Third-Party Defendants	)	

Submitted: October 6, 2006
Decided: January 10, 2007

Upon Defendant, Caravel Academy, Inc.'s Motion for Summary Judgment, **DENIED.**

OPINION AND ORDER

Ben T. Castle, Esquire, Neilli Mullen Walsh, Esquire, Young, Conaway, Stargatt & Taylor, LLP, Attorneys for Plaintiff.

Marc S. Casarino, White and Williams, LLP, Attorney for Defendant/Third-Party Plaintiff.

BRADY, J.

PROCEDURAL HISTORY

Plaintiff, Stephen B. Harden ("Mr. Harden") filed the instant personal injury action on March 2, 2005, for alleged injuries suffered in June, 2003 in Defendant Caravel Academy's batting cage. Caravel Academy filed a Motion for Summary Judgment on August 31, 2006. Mr. Harden filed a response in opposition to the motion on September 11, 2006. A hearing was held on September 26, 2006, and at the request of the Court the parties filed supplemental submissions on October 6, 2006. For the reasons that follow, Caravel's Motion for Summary Judgment is DENIED.

FACTUAL BACKGROUND

From the Summary Judgment record before the Court, the following undisputed facts emerge. Caravel Academy is a non-profit Delaware Corporation, located in Bear, Delaware. D. M. Peoples Investment Corporation owns the land upon which Caravel Academy is situated. The Caravel Academy property is classified as commercial and contains several school buildings, a daycare center, a gymnasium, a warehouse, a parking lot and one or more baseball fields. The baseball field at issue in this case is enclosed by a fence and contains batting cages owned by Caravel. When not in use by an authorized team, the cages are kept in a locked position.

In the summer of 2003, Caravel Academy permitted the Grand Slam Diamonds ("Diamonds"), an amateur baseball team, to practice and play in its baseball field, free of charge. As a condition of the use of the baseball field, the Diamonds were asked to provide a certificate of insurance naming Caravel as an insured on the policy.[1] Caravel also required a signed waiver stating that the team was responsible for the supervision of its players and for any damage caused to the property.[2]

The Complaint alleges that on June 23, 2003, Mr. Harden, who served as a volunteer coach for the Diamonds, was pitching balls to a batter inside a batting cage owned by Caravel Academy, when he was struck in the face by a ball that ricocheted off an exposed beam on the ceiling of the cage. As a result, Mr. Harden alleges, he sustained multiple facial fractures, requiring surgery and the placement of permanent plates and screws. For purposes of its Motion for Summary Judgment, Caravel accepts as true all of Mr. Harden's allegations as stated in the Complaint. Caravel contends, however, that it is immune from liability pursuant to Delaware's Public Recreational Use Act.

[1] Pl. Resp., Ex. C, Dep. of Paul S. Manubay, at 10-12.
[2] Pl. Resp., Ex. C, Dep. of Paul S. Manubay, at 10-12; It is not clear whether the Diamonds did, in fact, name Caravel as an insured and whether a signed waiver was submitted to Caravel. At the hearing, Caravel indicated that they have been unable to locate the signed waiver because it may have been misplaced.

STANDARD OF REVIEW

The standard for granting summary judgment is high.[3] Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[4] "In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party."[5] "When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted."[6] "Nor will summary judgment be granted if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstance."[7]

APPLICABLE LAW

The general purpose of the Recreational Use Act is to encourage landowners to open their lands to the public for recreational uses.[8] To

[3] *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).
[4] Super. Ct. Civ. R. 56(c).
[5] *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).
[6] *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).
[7] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[8] *See* 7 *Del. C.* §5901(2001).

further this purpose, the Act shields landowners from liability for ordinary negligence claims.[9]

7 *Del. C.* §5901 provides:

> The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes, whether such persons entered upon the land of the owner with or without consent of the owner.

7 *Del. C.* §5903 provides in relevant part:

> An owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. The limitation of duty of the owner granted by this section applies whether such persons entered upon the land of the owner with or without consent of the owner.

The Recreational Use Act may only be invoked by landowners who open their land to the public for recreational purposes, and may only be invoked to protect against claims made by those injured on the property.[10] For one's land to be available for public use requires an affirmative act of the owner to make the land areas available.[11] The protection from liability is

[9] *Gibson v. Keith*, 492 A.2d 241, 244 (Del. 1985).
[10] *Higgins v. Walls*, 901 A.2d 122, 131 (Del. Super. 2005).
[11] *Id.*

not intended for those landowners who attempt to deny public access to their lands.[12]

CONTENTIONS OF THE PARTIES

Caravel contends that the Recreational Use Act applies to bar Mr. Harden's claims for negligence. Caravel argues that because the baseball field was provided, free of charge, to Mr. Harden and others and Mr. Harden was using the property for its intended recreational purposes when he was injured, absent any allegations of willful or malicious misconduct, Caravel is immune from liability.

In response, Mr. Harden argues that the Recreational Use Act does not protect Caravel against liability because Caravel is not a landowner who has opened the property to the general public for recreational use. Specifically, Mr. Harden points to Defendant's Answer to the Complaint in which, Caravel denied the ownership of the land where the batting cage was situated.[13] Furthermore, Mr. Harden asserts that the baseball field was not open or accessible to the general public, but that the Diamonds were the only team with access to the property in the summer of 2003. Finally, Mr. Harden argues that the baseball field is not covered by the Act, as only

[12] *See Gibson*, 492 A.2d at 244.
[13] *See* Pl. Resp., at 2, ¶ 8*; see also* Def. Answ., at 1, ¶3.

undeveloped land and water areas are protected under the Recreational Use Act.

At the hearing the Court asked the parties to file supplemental submissions addressing ownership, the extent to which the land is open to the public, and the development of the land. In its submission, Caravel asserts that "owner," as defined by statute, includes tenants, lessees, occupants and persons in control of the premises[14] and "land" includes private ways and buildings, structures, and equipment.[15] Caravel contends that from the plain meaning of the words, the batting cage constitutes a structure and Caravel is the owner of such structure. Furthermore, Caravel asserts that nothing in the Act requires the land be made available to all persons all the time; the Act provides that owners are afforded immunity when opening the land to "any person" rather than "all persons."[16] Caravel does not set forth any facts or legal argument addressing the improvement and development of the land.

[14] *See* 7 *Del. C.* §5902.
[15] *Id.*
[16] *See* Def. Supp. Brief, at 3; In support of its position, Defendant cites the following cases from other jurisdiction with Recreational Use Acts similar to the Delaware statute *Johnson v. Stryker Corp*. 388 N.E.2d 932 (Ill.Ct.App. 1979)(recreational use immunity imposes no requirement to leave land open to all persons all the time); *Phillips v. Community Ctr. Foundation*, 606 N.E.2d 447 (Ill.App.Ct. 1992); *Peterson v. Swerley*, 460 N.W.2d 469 (Iowa 1990).

In its submission, Plaintiff contends Caravel is not the owner of the property and is, therefore, not entitled to immunity.[17] Plaintiff maintains the holding in *Gibson* that the Recreational Act applies only to the use of essentially undeveloped land and water areas, is controlling and operates to defeat immunity claims. Plaintiff points out that post-*Gibson* revisions to the Act did not nullify the Court's ruling that the Act was inapplicable to property in urban or residential areas. Finally, Plaintiff contends the batting cage was situated on developed land that is zoned as commercial and contains developed structures including a school, gymnasium, and a warehouse, and is bordered by a residential development. Therefore, Plaintiff contends the Recreational Use Act is inapplicable. [18]

ANALYSIS

Despite relatively simple language, Recreational Use statutes have been the subject of conflicting interpretations in a multitude of jurisdictions. In Delaware, the Supreme Court interpreted the Recreational Use Act in

[17] Plaintiff has submitted a copy of the Parcel Search, attached to Supplemental Response as Exhibit A.
[18] In support of its position, Plaintiff cites the following cases from other jurisdiction with Recreational Use Acts similar to the Delaware statute. *Walsh v. City of Philadelphia,* 585 A.2d 445 (Pa. 1991)(Recreational Act did not immunize City of Philadelphia from liability for injuries sustained on a basketball court at city owned recreation center*); Monteville v. Terrebonne Parish Consolidated Government*, 567 So.2d (La.1990)(Recreational Use Statute did not immunize parish from suit for injuries plaintiff sustained as a result of a defective boat ramp at the parish's several acre boat launch an trailer parking facility); *Harrison v. Middlesex Water Co*., et al., 403 A.2d 910 (N.J. 1979)(Landowner Liability Act did not apply to a lake located on a 94 acre property situated in an area zoned for residential use and surrounded by a high school, athletic fields and private homes.).

Gibson v. Keith.[19] The Court noted that the Delaware Act is derived from the Model Act and that forty-six other jurisdictions have adopted some variation of the same Model Act upon which Delaware's law is based. The Court analyzed the Recreational Use statutes from other jurisdictions and found four variations. Delaware, along with sixteen other states, adopted the Model Act essentially unchanged.[20] In *Gibson*, the Court noted that the Recreational Use Act is in derogation of the common law, and is therefore, subject to strict, rather than liberal, construction, and reviewed the law from those other jurisdictions in its analysis and interpretation of Delaware law. Similarly, due to the limited body of decisional law in Delaware, in deciding the instant motion, the Court will consider case law from Delaware as well as other jurisdictions which adopted a similar version of the Act.[21]

According to the statutory language and the Court's construction in *Gibson*, a party seeking the protection afforded by the Recreational Use Act must establish the following elements: 1) that the party is the owner of the land at issue, 2) that the land is made available for recreational use, 3) that the land is undeveloped, and 4) that the land is open to the public. In this

[19] 492 A.2d 241 (Del. 1985).
[20] *Id*. at 248.
[21] Jurisdictions with similar Recreational Use Acts include: Arkansas, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, Nebraska, Oregon, Pennsylvania, South Carolina, and Utah. *See Gibson*, 492 A.2d at 248.

case, it is undisputed that the land was made available for recreational use, free of charge. The remaining issues are whether Caravel is the owner of the land, whether the land is undeveloped property, and whether the land was open to the public.

Is Caravel the owner of the land?

7 *Del. C.* §5902 defines "owner" as "the possessor of a fee interest, tenant, lessee, occupant or person in control of the premises."[22] "Land" is defined by the statute as "land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty."[23] As previously stated, it is undisputed that Caravel is not the owner of the property upon which the batting cages are situated.[24] Caravel is, however, the owner of the batting cages and contends that the batting cages attached to the property constitute land as defined by statute.

As owner of the batting cages, Caravel is the owner of a structure attached to the realty and is therefore, an owner for the purposes of the Act.[25] Moreover, Caravel exercises control over the premises, as evidenced by the fact that Caravel maintains the property and has the authority to

[22] 7 *Del. C.* §5902(2).
[23] 7 *Del. C.* §5902(1).
[24] See Pl. Supp. Brief, Ex. A, New Castle County Parcel Search; *see also* Def. Answ., at 1, ¶3.
[25] *See* 7 *Del. C.* §5902(1) (defining "land" as including structures or equipment attached to realty).

permit or prohibit entry upon the land. Caravel's control over the land is sufficient to satisfy the ownership requirement of the statute.[26] The Court, therefore, finds that Caravel has established ownership as required by the Recreational Use Act.

Is the land undeveloped as required by the Supreme Court's interpretation of the Act?

The express language of the Act does not limit its application to undeveloped land. Nevertheless, the *Gibson* Court limited the application of the Act to "recreational use of *essentially* undeveloped land and water areas, primarily rural or semirural land, water or marsh" and held that the Act "does not apply to urban or residential areas improved with swimming pools, tennis courts and the like."[27] (Emphasis added). The Court's interpretation did not reach the issue of what constitutes undeveloped land and no other Delaware cases provide guidance on this issue.

In support of its position, Caravel cites *Redinger v. Clapper's Tree Service, Inc.,* a Pennsylvania case involving similar facts. In *Redinger*, the Pennsylvania Superior Court held that a fenced-in baseball field in a small

[26] *See* 7 *Del. C.* §5902(2) (defining "owner" as including a person in control of the premises).
[27] *Gibson*, 492 A.2d at 244.

community is land within the meaning of the Recreational Use Act.[28] The Court did not reach whether or not the land was undeveloped because the injury did not arise out of any improvement to the baseball field; the injury was caused by a falling, decayed tree limb, and the Court found that the limb came from a part of the land which remained unimproved.

While *Redinger* involves similar facts, it is important to note that Pennsylvania and Delaware courts conflict in their interpretation of the Act. While the Delaware Supreme Court held that the Act is in derogation of common law and is therefore, subject to strict construction, the Pennsylvania courts have held that the statute should be given the broadest interpretation to include all land bearing a resemblance to the true outdoors. Therefore, although factually similar, the *Redinger* decision cannot determine the result in this case.

The statutory definition of "recreational purpose" supports the Delaware Supreme Court's holding that the Act applies to undeveloped properties and sheds some light on what is considered undeveloped.[29] 7 *Del. C*. §5902 defines "recreational purpose" as including but not limited to "hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure

[28] 615 A.2d 743 (Pa. 1992).
[29] *See* 7 *Del. C*. §5902.

driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic or scientific sites." All of the expressly mentioned activities may be exercised in natural environments with minimal improvements or development upon the land. Furthermore, all of the activities are such that the required equipment must be brought onto the land by the participants. The Court, therefore, finds that the type of activities listed in the definition demonstrate the Legislature's intent to apply the Delaware Act only to undeveloped properties left in their natural state.

When recreational property has been enhanced with improvements that require regular maintenance, the owner has a duty to maintain such improvements for the safe enjoyment of recreationalists.[30] The more improved the property, the more reasonable it is for the user to expect that the owner has maintained it in a safe condition. [31]

The Caravel property has been improved and altered from its natural state to such an extent that it cannot be considered undeveloped land. First, by Caravel's own admission, the baseball fields are regularly maintained by

[30] *Walsh v. City of Philadelphia*, 585 A.2d 445 (Pa. 1991) ("When a recreational facility has been designed with improvements that require regular maintenance to be safely used and enjoyed, the owner of the facility has a duty to maintain the improvements. When such an improved facility is allowed to deteriorate and that deterioration causes a foreseeable injury to persons for whose use the facility was designed, the owner of the facility is subject to liability.").
[31] *Redinger v. Clapper's Tree Service, Inc.,* 615 A.2d 743, 748 (Pa. 1992).

Mr. Richardson who provides lawn care services.[32] Second, the property is situated in a commercially zoned location, in close proximity to residential communities.[33] Finally, the property is well lit and contains numerous developments including a school, gymnasium, and batting cages.[34] By developing the land to the extent it has, Caravel has taken on the responsibility of maintaining it and is thus precluded from the protections of the Public Recreations Act.

Is the land open to the public?

There is no existing body of decisional law in Delaware that specifically addresses the extent to which land must be open to the public to qualify for the application of the provisions of the Act. However, in *Gibson*, the Supreme Court stated that the Delaware Act was derived from the Model Act, which provides in its preamble, "in those circumstances where private owners are willing to make their land available to members of the *general public* without charge, it is possible to argue that every reasonable encouragement should be given to them." (Emphasis added). The *Gibson* Court further stated that the benefits of the Act were not intended for

[32] *See* Def. Answ. and Third-Party Compl.; also at the hearing Caravel admitted that the land is regularly maintained by lawn service providers.
[33] *See* Pl. Supp. Br., Ex. A, New Castle County Parcel Search.
[34] At the hearing, it was undisputed that Caravel Academy includes a school, a gymnasium and multiple baseball fields and batting cages; *See also* Pl. Supp. Br., Ex. A, New Castle County Parcel Search.

landowners who attempt to deny public access to their land.[35] In order to invoke the protective benefits of the Act, there must be evidence of the owner's intent to permit the public to enter for recreational use.[36] Moreover, a property owner who takes affirmative steps to deny public access, such as installing a fence or posting signs, cannot invoke the Recreational Use Act.[37]

In *Lee v. Department of Natural Resources*, the Georgia Appellate Court held that the Act only applies where the owner "permits the free use of his facilities or land by *the public* generally or by a particular class of the public, such as Little Leaguers, Boy Scouts, etc., and permitting free use by classes of *individuals* is not sufficient."[38] Similarly, the Illinois Court of Appeals held the Act did not apply where the land was not open to the public generally but only to association members and their guest.[39]

In the instant case, neither the land nor Caravel's batting cages were open to public access. The baseball field is surrounded by a fence which is normally locked and inaccessible by members of the public.[40] Caravel has offered no evidence that the fields were open to access by any other team or

[35] *Gibson*, 492 A.2d at 245.
[36] *Id*.
[37] *Id*.
[38] 588 S.E.2d 260, 263 (Ga. App. 2003).
[39] *Bier v. Leanna Lakeside Property Association*, 711 N.E.2d 773 (Ill. 2d Dist. 1999).
[40] *See* Plaintiff's Response Brief, Exhibit C, Transcript of Paul S. Manubay, at p. 29-30.

members of the public. Caravel admits the batting cages were normally locked up by Mr. Richardson and he was not authorized to use the key to allow anyone access to the cages without prior authorization by Caravel.[41] The Diamonds had to request permission to use the baseball field, and Caravel only agreed to allow access to the premises on the condition that the Diamonds sign a request permit and add Caravel as an additional insured on the Diamonds' liability insurance policy.[42] Under these facts, the Court finds that Caravel has not taken any affirmative step toward making the cages available for public recreational use and has indeed denied access by keeping the cages locked up. Therefore, Caravel cannot benefit from the protections of the Recreational Use Act.

[41] *See* Def. Answ. and Third-Party Compl..; Caravel has asserted third-party claims against Mr. Richardson for opening the batting cages and allowing the Diamonds to have access to the cages on the day of the incident without prior authorization.

[42] The undisputed facts establish that the Diamonds' agreed to but did not actually add Caravel as an insured on the liability policy.

CONCLUSION

For the reasons set forth herein, the Court finds that Caravel is not entitled to immunity pursuant to the Delaware Public Recreational Use Act. Accordingly, the Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/

M. Jane Brady
Superior Court Judge